

SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, DE 19801-3733
Telephone (302) 255-0669

September 19, 2012

(VIA E-FILED)

Gary S. Nitsche, Esquire
Weik, Nitsche & Dougherty
305 N. Union Street, Second Fl.
P.O. Box 2324
Wilmington, DE 19899

Kenneth M. Doss, Esquire
Casarino, Christman, Shalk,
Ransom & Doss
405 N. King Street, Suite 300
P.O. Box 1276
Wilmington, DE 19899

Benjamin C. Wetzel, III, Esquire
Wetzel & Associates
2201 W. 11th Street
Wilmington, DE 19805

RE: *Rodriguez and Miller v. Con-Way Transp., LLC, et al.*
C.A. No. 08C-11-223 FSS

Upon Defendants' Motions for Summary Judgment - DENIED.

Dear Counsel:

This further memorializes the court's preliminary decisions from the August 10, 2012 summary judgment argument. Briefly, apart from alleging a semi-truck hit them, plaintiffs cannot describe the vehicle involved in the April 9, 2008 hit-and-run. Based on this "phantom" vehicle, Plaintiffs settled claims with their uninsured motorist carrier, Progressive. The UM release reads, in part: "... in full settlement and final discharge of all claims under the numbered policy for bodily injuries . . . arising out of the ownership or operation of an uninsured automobile by an unknown driver"

Gary S. Nitsche, Esquire
Kenneth M. Doss, Esquire
Benjamin Wetzel, III, Esquire
Rodriguez and Miller v. Con-Way Transp., LLC, et al.
C.A. No.: 08C-11-223 FSS
Letter/Order
September 19, 2012
Page 2

Defendants learned about the UM settlement at the May 29, 2012 mediation. Based upon the UM release, Defendants separately moved for summary judgment. Specifically, Defendants argue that the release amounts to a “judicial admission” that Plaintiffs do not know who or what hit them, and they cannot not sue Defendants. Con-Way also argues that Plaintiffs cannot meet their burden of proving identity based upon the limited, equally balanced evidence against Defendants.

As ruled during oral argument, the UM release has no bearing here and does not bar Plaintiffs from seeking judgment against Defendants. Again, if Plaintiffs do recover, that will be a separate issue between them and Progressive. And, if Plaintiffs attempt to identify a defendant, they may be cross-examined about the release.

Despite Plaintiffs’ inability to identify the truck, there is circumstantial evidence. The sole witness on identity, Jeffrey Vega, followed the truck and wrote down the trailer’s Indiana license plate number. At his deposition, Vega described the trailer as “white with blue writing,” specifically recalling that the trailer’s rear read “Con-Way.” Although Vega’s description matches Con-Way trailers, the license plate was registered to a Penske trailer, leased by Howmet. At oral argument, Howmet described the Con-Way and Howmet trailers as similar in color. Additionally, records reflect that a Howmet trailer passed through a toll plaza near the collision scene a short time later.

The court appreciates the doubt surrounding a verdict against Con-Way. That said, considering all the evidence in the light most favorable to Plaintiffs, Defendants’ Motions for Summary Judgment are **DENIED**. Therefore, the trial will go forward on October 10, 2012. The court appreciates counsel’s efforts to accommodate this earlier start date.

Gary S. Nitsche, Esquire
Kenneth M. Doss, Esquire
Benjamin Wetzel, III, Esquire
Rodriguez and Miller v. Con-Way Transp., LLC, et al.
C.A. No.: 08C-11-223 FSS
Letter/Order
September 19, 2012
Page 3

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
oc: Prothonotary (Civil)